

STATE OF CALIFORNIA
State Energy Resources
Conservation and Development Commission

In the Matter of:)	Docket No. 00-AFC-12
)	
Application for Certification for the)	REPLY BRIEF IN SUPPORT OF
MORRO BAY POWER PLANT)	REQUEST FOR SUBPOENA;
PROJECT)	SUPPLEMENTAL DECLARATION
_____)	OF BONITA L. CHURNEY

Neither the Applicant's (Duke's) nor Staff's Opposition to CAPE's Request for Subpoena has any merit. Duke's argument regarding the law is simply wrong and both Duke's and Staff's factual arguments are incorrect. Furthermore, Duke and Staff ignore entirely the crucial issues presented to the Committee by this Request: do the rules relating to procedural matters and rebuttal testimony apply to all parties, evenhandedly, or are there two sets of rules, one for Duke and Staff and another for citizens' intervenor groups? Does the Committee exist to seek the whole truth and complete environmental disclosure or only what the Applicant wants the Committee to hear?

Duke's arguments regarding the narrow scope of the Committee's subpoena powers are belied by the applicable regulations cited by Staff in its brief.¹ Both Duke and Staff argue that Dr. Fox's testimony is not rebuttal and should therefore have been prefiled. However, that is simply untrue as demonstrated by the Churney Declaration re Good Cause. Moreover, denial of CAPE's request would be procedurally unfair given the Committee's prior generous interpretation of the rules in Duke's and Staff's favor.

The Committee's procedures exist under the umbrella that is CEQA, which is essentially an environmental disclosure statute. *Rural Land Owners Ass'n v. Lodi City Council*, 143 Cal.App.3d 1013, 1020, 192 Cal.Rptr. 325, 329 (1983); *see also*

¹ Pub. Res. Code §25210; Govt Code §11181; 20 Calif. Code of Regs §1203(b). The latter rule in no way limits its terms to discovery nor supersedes the otherwise broad subpoena powers of the Committee.

Concerned Citizens of Costa Mesa v. 32nd Dist. Agricultural Ass’n, 42 Cal.3d 929, 936 231 Cal.Rptr. 748, 752 (1986). The residents of Morro Bay who have formed CAPE have a privileged position in the CEQA process.² However, the Request for Subpoena by CAPE does not demand any special procedural privileges – only that the procedures which exist be applied evenhandedly. Duke and Staff, in opposing CAPE’s subpoena request, are attempting to thwart complete disclosure and discussion of a critical environmental impact, i.e., the effect of PM₁₀ pollutants from the Project on the residents of Morro Bay. This cannot be allowed and, in fact, only underscores the importance of Dr. Fox’s testimony.

The facts and the law support CAPE’s Request for Subpoena. Each of the twelve items in the Churney Declaration re Good Cause (§12,a-1) relate to facts that arose on cross-examination of Mr. Rubenstein and were not contained in his prefiled testimony. Each arose out of questions by CAPE to clarify and probe his very summary statements and positions contained in his prefiled or oral direct testimony. The substance of his responses were not known to CAPE (and could not have been known) until he made them at the February 6, 2002 hearing, and those responses were not in accord with CAPE’s understanding of the facts. Thus, contrary to Duke’s and Staff’s arguments, the issues addressed in the Request for Subpoena could not have been anticipated and prefiled in advance by CAPE, absent clairvoyant capabilities.

CAPE acted as timely as possible in filing the Request for Subpoena on February 20, 2002, given that the transcript for the February 6, 2002 hearing was not released until February 15, 2002 and Dr. Fox was not contacted on these specific issues until February 9, 2002. Any earlier contacts by CAPE with Dr. Fox are simply

² In the *Costa Mesa* case, *supra*, the California Supreme Court stated: “[T]he ‘privileged positions that members of the public hold in the CEQA process . . . is based on a belief that citizens can make important contributions to environmental protection and on notions of democratic decision-making . . . CEQA compels an interactive process of assessment of environmental impacts . . . premised upon a full and meaningful disclosure of the scope, purposes, and effect of a consistently described project, with flexibility to respond to unforeseen insights that emerge from the process.’” *Id.*, citations omitted.

irrelevant.³ As to necessity, the moving papers make clear Dr. Fox's expertise on the very specific rebuttal topics at issue and her long history of testifying in similar matters before the CEC and elsewhere. As set forth in the Supplemental Declaration of Bonita L. Churney attached hereto, there are no other experts with Dr. Fox's qualifications who are willing to testify on the specific facts at issue for an impecunious citizens group. The speculative possibility that there exists other experts in the world who are unavailable to CAPE and unfamiliar with this case should not foreclose the issuance of the requested subpoena.

CAPE needs to subpoena Dr. Fox because of objections by her clients to her voluntary testimony. Duke's intimation of possible ethics or professional or privilege issues is baseless. To the contrary, Dr. Fox's willingness to testify if subpoenaed indicates there are no such problems.⁴

Furthermore, because neither Duke nor Staff has been required to prefile rebuttal testimony in the proceedings that have occurred to date, it would be fundamentally unfair to deny CAPE's Request for a Subpoena for failure to prefile its rebuttal testimony.⁵ The Request itself succinctly summarizes the substantive areas of Dr. Fox's rebuttal testimony, well in advance of the hearing, precluding any prejudice.

Finally, concerns with timing issues cannot be allowed to undercut the full disclosure and discussion requirements under CEQA.⁶ CAPE has consistently been pressured by the Committee to cut its original time estimates and to shortcut its examination of Duke and Staff witnesses, rather than encouraged to get the relevant facts before the Committee.⁷ The Committee cannot use the excuse of timing difficulties to

³ When Ms. Churney contacted Dr. Fox in 2001, she was not acting as counsel for CAPE. Ms. Churney's firm was not retained by CAPE in these proceedings until on or about December 15, 2001.

⁴ It would clearly be a waste of her time to be subpoenaed and to travel to Morro Bay only to assert a privilege or an ethical conflict of interest.

⁵ Contrary to Staff's incorrect assertion, neither the First nor Second Notice of Hearings required prefiling of rebuttal testimony.

⁶ Staff's concern of never-ending rebuttal is ridiculous. Just as Duke and Staff have presented their rebuttal witnesses during the time allocated for direct testimony, so too will CAPE present its rebuttal during the time otherwise reserved for its direct testimony.

⁷ For example, under pressure from the Committee at the Prehearing Conference, CAPE reduced its original time estimates significantly. During the course of subsequent Scheduling Conferences, CAPE was

preclude CAPE from offering relevant rebuttal testimony within the time estimates already agreed to by the Committee. There is also no “unjust benefit” to CAPE as a result of the interruption of the previous Air Quality hearings by circumstances that were beyond its control. Although CAPE was allowed to put on its out-of-state expert witness out of order, the testimony was severely truncated to CAPE’s disadvantage.⁸ Furthermore, there is no “unjust benefit” to CAPE or the citizens of California in getting the true facts before the Committee, whether or not that opportunity for rebuttal would have existed had the hearings of February 6, 2002, not been cut short in such an untimely fashion. The issue is not gamesmanship, as Duke perceives it, but rather providing the Committee with full and complete facts so that it can render a proper decision.

For the reasons stated above and in CAPE’s moving papers, the Committee should grant the Request for Subpoena as soon as possible to allow for appropriate travel arrangements to be made for Dr. Fox.

Respectfully submitted,

BRYAN CAVE LLP
BONITA L. CHURNEY, ESQ.
P.O. Box 764
Morro Bay, California 93443
Telephone: 805-772-5726
Facsimile: 805-772-5726
E-mail: blchurney@bryancave.com

DATED: March 3, 2002

By: _____
Bonita L. Churney

again pressured to reduce both its direct and cross-examination estimates. Mr. Hartman’s direct testimony was reduced to less than five minutes on February 6, 2002, leaving an hour and 55 minutes left to present the direct and rebuttal of Ms. Soderbeck and Dr. Fox, which is more than enough time for both. Additionally, the Third Notice of Hearings allows for an extra half-day, if necessary, for carryover topics. CAPE has filed no direct testimony on either Land Use or Visual Resources and only two pages of testimony on Soil and Water, indicative of the short amount of time that will be required by CAPE.

⁸ If anything, Duke’s counsel manipulated this situation to its own advantage by first intimating that it had extensive cross-examination for Mr. Hartman, causing Hearing Officer Fay to request that CAPE offer Mr. Hartman for cross-examination without any direct. Duke in fact had only three short questions for Mr. Hartman and then opposed any reopening of direct or rebuttal, although time remained for both.

Attorneys for Intervenor The Coastal
Alliance on Plant Expansion

SUPPLEMENTAL DECLARATION OF BONITA L. CHURNEY

I, BONITA L. CHURNEY, declare:

1. I am an attorney duly licensed to practice law in the State of California and I am one of the attorneys representing Intervenor The Coastal Alliance on Plant Expansion (“CAPE”) before the Commission in these proceedings. I have personal knowledge of the facts stated herein and if called as a witness I would testify as set forth below.

2. My firm, Bryan Cave LLP, was not retained by CAPE in this matter until on or about December 15, 2001.

3. Prior to my firm’s retention as counsel, acting on my own behalf as a resident of Morro Bay I contacted or attempted to contact at least a dozen expert witnesses in the area of air quality to assist CAPE in obtaining expert assistance in this matter. Not a single air quality expert that I contacted, with the exception of Dr. Fox and Mr. Hartman, was willing to even consider helping CAPE. Various excuses were given by the many experts that I talked to (none based on substantive views), but I have no doubt that the inability of CAPE to pay more than nominal fees for their services had a bearing on their refusal to assist CAPE. I am also aware that Pamela Soderbeck and a member of CAPE’s Board made similar inquiries to no avail.

4. Subsequent to Mr. Rubenstein’s February 6, 2002, cross-examination, I contacted Dr. Fox on February 9 to request that she consider testifying on the very specific issues which arose in the course of Mr. Rubenstein’s cross-examination. Based on my prior attempts to enlist expert assistance, I knew that only Dr. Fox was able, based on her qualifications and expertise, and, I hoped, willing to provide the rebuttal testimony enumerated in my prior declaration. As to those issues, I did not know, until after Mr. Rubenstein’s cross-examination was complete, that rebuttal would be required.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 3rd day of March, 2002, at Morro Bay, California.

Bonita L. Churney